

**Citation:** Volume 5, 5 CCR 1002, 1002-31, 1002-31

**Jurisdiction:** Colorado      **Document Date:** November 30, 1991      **Page Count:** 13

**Section Title:** 31.23 Statement of Basis, Specific Statutory Authority and Purpose (1988 Revisions -- Antidegradation) (Integrated)

**Subject** water, water quality, surface water

**Terms:**

**Source:** Integrated Document

---

31.23 Statement of Basis, Specific Statutory Authority and Purpose (1988 Revisions -- ~~Antidegradation~~).

The provisions of 25-8-202(1)(a), (b) and (2); 25-8-203; and 25-8-204; C.R.S., provide the specific statutory authority for adoption of the attached regulatory amendments. The Commission also adopted, in compliance with 24-4-103(4) and 24-4-103(8)(d) C.R.S., the following statements of basis and purpose and fiscal impact.

Basis and Purpose:

A. ~~Antidegradation~~.

1. Basis for ~~Antidegradation~~ Provisions.

Section 25-8-102(2), C.R.S., declares a public policy "to conserve state waters and to protect, maintain, and improve, where necessary and reasonable, the quality thereof for public water supplies, for protection and propagation of wildlife and aquatic life, for domestic, agricultural, industrial, and recreational uses, and for other beneficial uses." To implement this policy, the Commission is required to "develop and maintain a comprehensive and effective program for prevention, control, and abatement of water pollution and for water quality protection throughout the entire state." Section 25-8-202(1), C.R.S. As part of the water quality protection program developed to implement these statutory directives, the ~~antidegradation~~ provisions that are now being revised have been in place since 1979. The current Commission reaffirms its belief that an appropriate ~~antidegradation~~ rule is an important and integral part of a comprehensive and effective water quality protection program designed to serve the statutory purposes.

The Commission believes that Colorado's highest quality waters are a unique natural resource that warrants special protection. Moreover, the Commission believes that the revised ~~antidegradation~~ rule and review process set forth in the accompanying revisions are economically reasonable. Therefore, the amendments also are consistent with that portion of the legislative declaration set forth in section 25-8-102(5), C.R.S. Assuring protection of Colorado's unique, high quality natural environment is an important component of maintaining the attractiveness of our State for future economic development. At the same time, the revisions now being adopted are designed to assure

that important economic or social development will be allowed to proceed even where such development requires limited degradation of high quality waters, so long as there has been an adequate investigation of potentially non-degrading alternatives. In this regard, it is important to recognize that the use classifications and narrative and numeric water quality standards already in place will prevent any major degradation of high quality waters. In no case may degradation exceed water quality standards or interfere with or injure existing classified uses. Irrespective of the ~~antidegradation~~ policy, in many instances no further degradation for particular parameters on Colorado streams will be allowed because numeric standards have been set equal to the existing ambient water quality.

The Commission believes that the ~~antidegradation~~ rule as revised is one useful tool to assure the protection of beneficial uses of State waters for current and future generations. Although the water quality standards system has become substantially more sophisticated over the last decade, there are still significant uncertainties regarding the levels of specific pollutants that are consistent with the protection of various uses, and there are many specific pollutants for which no water quality standards have been set. In the face of this uncertainty, the ~~antidegradation~~ rule provides an extra layer of protection for the beneficial uses of the State's highest quality waters.

Finally, the revisions adopted should help eliminate any controversy regarding whether Colorado's ~~antidegradation~~ standard satisfies the requirements of the federal Clean Water Act. Although the Commission believes that its previous ~~antidegradation~~ provisions were legally valid and had effectively been approved by EPA, these revisions should largely eliminate that issue. Therefore, while the Commission has proceeded by attempting to determine what ~~antidegradation~~ policy is in the best interests of the State of Colorado, an additional benefit of these revisions is that they should more clearly comply with requirements established by EPA under the federal Clean Water Act.

## 2. Hybrid ~~Antidegradation~~ Review Approach.

The previous version of this regulation relied on a classification-based approach to ~~antidegradation~~ -- i.e., only waters classified "High Quality" were subject to ~~antidegradation~~ review requirements. EPA initially advocated a purely non-classification-based approach to ~~antidegradation~~ --i.e., all waters would potentially be subject to ~~antidegradation~~ review requirements, depending on a site-specific assessment of quality at the time that an individual activity undergoes review. The revisions adopted create a hybrid approach to ~~antidegradation~~. The regulation now establishes three categories of waters for ~~antidegradation~~ purposes:

- (1) waters designated High Quality 1 or 2,
- (2) waters designated "Use-Protected", and
- (3) waters classified cold water aquatic life class 1, or warm water aquatic life class 1 and recreation class 1, with no affirmative or negative quality-based designation.

This hybrid system combines many of the benefits of the previous classification-based approach with benefits of the non-classification-based alternative advocated by some parties.

When sufficient evidence is available, the system adopted preserves the option for the Commission to make the policy decision as to which waters do or do not warrant the extra protection afforded by an ~~antidegradation~~ review. Such action by the Commission occurs in a rulemaking forum, which is more conducive to broad public review and comment than decisions made solely in connection with the processing of individual permits. At the same time, the hybrid approach retains flexibility to handle on a case-by-case basis a category of waters which -- due to lack of information or ambiguous factual characteristics -- do not warrant a formal, affirmative or negative quality-based designation. This flexibility is similar to that available under the non-classification-based alternative. The hybrid approach preserves the additional benefit of being a proactive, planning-based approach instead of a purely reactive system. Under the purely non-classification-based alternative, a determination of which waters are "High Quality" can be made only at the time there is a specific proposal to degrade those waters (e.g., a new point source discharge). Once a specific development is at issue, it may be more difficult to make an objective determination whether the waters in question warrant special protection. With the hybrid approach, a decision may be made as to which waters warrant special protection prior to a confrontation with specific proposed developments. Once the initial water quality-based designation decisions are made, the public is on notice in advance that waters designated "High Quality" will receive the special protection provided by the ~~antidegradation~~ review. Furthermore, the addition of the "Use-Protected" designation option allows the public to be put on notice that the ~~antidegradation~~ review will not be required for specified streams, where site-specific facts warrant that designation.

### 3. Revised ~~Antidegradation~~ Rule (section 3.1.8(1)).

The title of this section has been changed from "~~Antidegradation~~ Standard" to "~~Antidegradation~~ Rule." This new title more accurately describes the nature of the revised regulation. The ~~antidegradation~~ provisions are not themselves a water quality standard, but rather a set of criteria and requirements that determine whether specific waters are to be maintained and protected at existing quality or rather protected solely by applicable narrative and numerical water quality standards. The Commission rejected the title "~~Antidegradation~~ Policy" because "policy" might imply non-mandatory provisions. Consistent with this change in terminology, section 3.1.7(1)(a), which listed "~~antidegradation~~ standard" among those standards that may be applied to State waters, has been deleted.

Although many of the concepts in the previous ~~antidegradation~~ provisions have been retained in the new section 3.1.8(1), this material has been completely reorganized and rewritten consistent with the new hybrid approach. Subsection 3.1.8(1)(a) describes the three levels of water quality protection that may apply to Colorado surface waters,

and essentially replaces the provisions of the previous section 3.1.8.

Subsection 3.1.8(1)(a)(i) regarding High Quality 1 waters has been revised to delete the previous "no degradation" language. The revised language is consistent with that in EPA's ~~antidegradation~~ policy. This change is intended to recognize, as EPA has, that activities which result in only temporary or short term changes in water quality may be allowed for these waters.

Subsection 3.1.8(1)(a)(ii) regarding waters subject to an ~~antidegradation~~ review has been revised to pattern the language in EPA's ~~antidegradation~~ policy more closely. As elaborated in the discussion of the ~~antidegradation~~ review process below, the Commission believes that this language forms the basis for a reasonable and appropriate Colorado regulation.

In subsection 3.1.8(1)(a)(iii), the regulation now specifies that it is existing classified uses that are to be protected. This should not represent a significant change in practice since, pursuant to section 3.1.13, all existing uses should be classified uses. The language also now clarifies how protection of classified uses may be measured -- i.e., by compliance with narrative and numerical standards.

Subsection 3.1.8(1)(b) summarizes which waters are and are not subject to the ~~antidegradation~~ review requirement, which provides the intermediate level of water quality protection described in subsection 3.1.8(1)(a)(ii). This subsection establishes the hybrid approach: Based on the High Quality 2 and Use-Protected designations certain waters will always or never require ~~antidegradation~~ reviews, while a middle category is reserved for which an ~~antidegradation~~ review is potentially required, based on a case-specific assessment. This case-specific quality assessment provides flexibility by focusing specifically on parameters likely to be adversely impacted by a particular proposed activity.

The language in the regulation clarifies that an activity-specific determination under this subsection does not create a water quality-based designation for the waters in question. Of course, based on information generated in connection with such an activity-specific assessment, the Division or any other person could request that the Commission consider adopting a High Quality 1 or 2 or a Use-Protected designation for the waters.

#### 4. Water Quality-Based Designation Criteria (section 3.1.8(2)).

##### a. Overview.

The criteria for designating waters "High Quality" have been moved from section 3.1.13 to section 3.1.8. In addition, the terminology has been changed to refer to "water quality-based designations" rather than "classifications". A definition of this term has been added to section 3.1.5. These changes are intended to avoid confusion and help clarify that "High Quality" designations are not "use classifications". These designations do not describe a separate "use" of a water body, but rather establish an extra layer of protection

for those uses that are present. Therefore, provisions applicable solely to use classifications, such as the downgrading provisions in section 3.1.6 and such as hearings pursuant to section 25-8-207, C.R.S., do not apply to water quality-based designations.

The language of the subsection describing the High Quality 1 designation (now subsection 3.1.8(2)(a)) has been substantially revised and shortened. This change is intended to be consistent with the new criteria for applying a High Quality 2 designation, allowing High Quality 1 to be applied whenever High Quality 2 requirements are met as a minimum and the Commission determines that the extra protection is warranted.

The Commission has established new criteria in section 3.1.8(2)(b) to help clarify which State surface waters should be designated "High Quality 2." The goal of these criteria is to assure that all waters whose quality exceeds levels necessary to support fishable/swimmable uses are designated High Quality 2, unless the Commission has determined that the "Use-Protected" designation is appropriate, as described in section 3.1.8(2)(c), and below.

The question when "the quality of waters exceeds levels necessary to support" specified uses is subject to considerable interpretation. The quality of any specific water body can vary substantially throughout the year, and, at any given time, can vary substantially among the wide range of pollutants of potential concern. The criteria adopted reflect the Commission's judgment as to how the "High Quality" concept should be applied in view of the wide range of factual circumstances that exist in nature.

Specific criteria also have been established to specify when waters should be designated "Use-Protected," in accordance with the new hybrid approach.

#### b. High Quality 2 Designation Criteria.

The previous classification provisions contained only a very general statement as to when a High Quality 2 designation is appropriate. The new criteria are intended to provide more specificity and predictability to this determination, while retaining important flexibility to take unique, site-specific circumstances into account. Three automatic grounds are provided for applying the High Quality 2 designation. The first two grounds represent circumstances in which the Commission has determined that the extra layer of protection provided by an ~~antidegradation~~ review is always appropriate. The third automatic ground is a strictly water quality-based test of whether the waters in question are "high quality." This test is somewhat conservative in terms of applying the High Quality 2 designation in that it requires existing quality to be better than "table values" for each of 12 key parameters. These specific parameters have been selected from Tables I, II and III as those which have a significant likelihood of being present in some Colorado waters at background levels (not influenced by point source discharges) above the table values. The Commission intends that the Division should exercise its best professional judgment to determine what is representative data on a case-by-case basis. While any specific test is necessarily somewhat arbitrary in terms of the wide variety of conditions that exist in nature, the Commission believes that a predictable test is a helpful

and necessary administrative tool.

In addition to the three automatic grounds, the Commission has established a discretionary basis for applying the High Quality 2 designation whenever special reasons are present to provide the extra protection of the ~~antidegradation~~ review for specific waters. For example, after considering all of the relevant facts in a particular case, the Commission could decide that a specific gold medal trout fishery or waters containing state or federal threatened or endangered species warrant this extra protection.

c. "Use-Protected" Designation Criteria.

These criteria have been added to provide a predictable basis on which the Commission can determine when certain waters should be designated in advance as waters to which the ~~antidegradation~~ review will not apply. Three automatic grounds are provided for this designation. The first ground is definitional. Under the revised descriptions of the aquatic life classifications that are being adopted concurrent with these changes, waters classified aquatic life class 2, or recreation class 2 and warm water aquatic life class 1, do not have quality "higher than necessary to support primary contact recreation and propagation of fish, shellfish, and wildlife." (Note that waters classified cold water aquatic life class 1 and recreation class 2 do not automatically qualify for the use-protected designation. This is because the Commission recognizes that in many instances where this combination of classifications is present, the recreation class 2 classification is based on physical limitations to primary contact recreation, rather than on poor water quality.)

The second ground for this designation is a strictly water-quality based test. In order to avoid too liberally excluding high quality water resources from the ~~antidegradation~~ review without case-specific information, the test requires that three or more of the listed 12 parameters must have quality worse than table values to apply the "Use-Protected" designation on this basis. Note, however, that for waters left in the middle category (no High Quality or Use-Protected designation), the presumption that an ~~antidegradation~~ review is required is overcome at the time of the case-specific review if only one parameter likely to be adversely impacted by a particular activity has worse quality than required by table values.

The third automatic ground for this designation is where the current quality is maintained better than standards only because of dischargers' treatment efforts. The Commission believes that this provision is appropriate, because in the absence of such a provision some dischargers may have a disincentive to treat to the highest levels possible, for fear that their success could result in a High Quality designation and, in turn, more stringent discharge permit requirements.

Finally, the Commission also has established two separate discretionary grounds for applying the "Use-Protected" designation. First, the designation may be applied where the Commission determines that due to the likelihood that substantial, new or expanded development will occur, it is unlikely that economically, environmentally and



technologically reasonable water quality controls will be able to maintain the quality of particular waters above standards. The Commission intends that this basis for designation would be applied cautiously, only when pending development proposals are substantial enough, along with the existing development, if any, to provide a firm basis for determining that degradation of the waters in question is necessary. However, the Commission believes that when such circumstances are present, for administrative efficiency it is appropriate to apply this designation in advance rather than require each activity to undergo a separate ~~antidegradation~~ review.

The second discretionary basis for applying this designation is where the quality of the waters in question is limited by substantial pollution from substances other than the 12 parameters listed for the quantitative water quality test discussed above. The Commission anticipates that the application of this basis for designation is likely to be limited, but believes that this option should be provided to assure adequate flexibility.

## 5. ~~Antidegradation~~ Review (section 3.1.8(3)).

### a. Applicability Provisions.

The Commission has determined that the ~~antidegradation~~ review should apply to all regulated activities with new or increased water quality impacts that may degrade the quality of reviewable waters (as defined by the ~~antidegradation~~ rule, applying the hybrid system). The Commission has clarified that "regulated activities" currently includes those requiring NPDES permits or section 401 certifications. The Commission has retained the flexibility for the regulation to apply to other types of activities, e.g., nonpoint sources, if such activities are addressed by control regulations in which the Commission has determined that application of the ~~antidegradation~~ review requirements is appropriate. This approach recognizes the status of current regulatory efforts, but provides the flexibility for those to be expanded as necessary in the future.

The regulation also clarifies that the ~~antidegradation~~ review is conducted with respect to activities with "new or increased" water quality impacts. The review is intended to limit future degradation and is not intended to be applied as a means to require remediation of prior impacts. For example, only increased point source loadings above those levels already permitted shall be subject to an ~~antidegradation~~ review.

The Commission also had added language to section 3.1.8(3)(a) stating its intent that the ~~antidegradation~~ review be coordinated or consolidated with other regulatory reviews whenever possible. The Commission recognizes that many new projects already face substantial regulatory hurdles. Any procedural steps that can be taken to minimize the regulatory burden, while still providing the necessary substantive environmental protection, should be encouraged.

### b. Division and Commission Roles.

The Commission has decided that ~~antidegradation~~ review responsibilities should be

shared between the Commission and the Division. It is appropriate for the Division to make the initial determination whether a particular activity involves "significant degradation", since this is largely a technical analysis. In addition, although it involves more than a mechanical, technical analysis, the Commission has decided that on balance it is preferable for the Division to have the initial responsibility for the determination whether the degradation is necessary to accommodate important economic or social development in the area in which the waters are located. Several parties recommended that this latter determination be made in the first instance by the Commission. The Commission believes, however, that requiring it to hold a hearing with respect to every such determination may be an unnecessary additional burden in the permitting or approval processes to which regulated activities are subject. Especially considering that the Commission's agenda typically is filled up several months in advance, significant delays could result from this approach. In many instances where an ~~antidegradation~~ review determination is not subject to substantial controversy, considerable time may be saved by delegating authority for this initial determination to the Division.

At the same time, the Commission has provided for de novo review of the Division's determinations by the Commission. When significant controversy exists, this provides for essentially the same level of Commission input into the ~~antidegradation~~ determination as if the Commission were responsible for the determination in the first instance. The Commission believes that on balance the adopted approach is likely to save regulatory resources for both activity proponents and the Commission, while not significantly changing the level of effort required from the Division, since it would be involved in advising the Commission even if it did not have decision-making authority.

The Commission discussed whether its involvement in the ~~antidegradation~~ review process, with respect to activities requiring a discharge permit, might run afoul of the "conflict of interest" provision in section 304(i) of the federal Clean Water Act. The Commission believes that it does not. The result of the Commission's involvement in the ~~antidegradation~~ review process is a determination of which water quality standards (i.e., existing quality v. specific numeric standards) will apply in a particular fact situation. The resulting standards are then used in drafting a discharge permit, but the Commission itself is not "approve(ing) permit applications or portions thereof." The impact of the Commission's ~~antidegradation~~ review decisions on an individual discharger is no more direct than when the Commission adopts ambient water quality standards on any single-discharger water segment in the State.

#### c. Significance Criteria.

Although virtually any impact on a water body could theoretically degrade the water, the Commission believes that any practical ~~antidegradation~~ policy must focus on the presence of "significant" degradation. If degradation is insignificant, it would not be reasonable to devote substantial administrative and private resources to prevent the degradation. This approach of screening insignificant degradation out of the ~~antidegradation~~ review process is supported by EPA in guidance documents that it has provided to the Commission. Therefore, the criteria set forth in the regulation are



designed to screen out insignificant impacts. These criteria have been structured in an effort to take cumulative impacts into account.

Establishment of a specific dividing line between "significant" and "insignificant" degradation is necessarily somewhat arbitrary. However, establishing some dividing line is necessary for purposes of predictability and administrability. From the evidence submitted the Commission believes that the specific criteria adopted are appropriate from a technical standpoint to assure that any substantial new degradation will be subject to the full ~~antidegradation~~ review process.

In addition to the specific significance tests set forth in section 3.1.8(3)(c)(i) -- (iv), the regulation provides an additional significance screen for waters designated High Quality 2 due to the presence of exceptional reasons for extra protection. For these waters, degradation will be considered insignificant if there is no adverse impact with respect to the specific reasons for the high quality designation. For example, for a proposed project on a segment designated high quality due to threatened or endangered species, in appropriate circumstances the U.S. Fish and Wildlife Service may issue a "no jeopardy" biological opinion or a biological opinion that identifies potential jeopardy based solely on non-water-quality impacts, as a result of section 7 consultation under the federal Endangered Species Act. The Division should determine that such an opinion demonstrates no adverse impact with respect to the threatened or endangered species. Therefore, such a project would be considered not to result in significant degradation and no further ~~antidegradation~~ review would be required. Where the U.S. Fish and Wildlife Service has specifically addressed threatened and endangered species protection with respect to a proposed project, there is no need for the ~~antidegradation~~ review process to require an additional analysis of this issue, for streams subject to ~~antidegradation~~ review solely to protect such species.

The "mitigation" concept that is incorporated into the determination of "significant degradation" is intended to encourage a practical approach to water quality protection. If anticipated impacts are offset by substantial water quality-enhancing mitigation measures, the Commission could find that the net effect of a proposed activity would be insignificant degradation. For example, in some circumstances an activity could result in lowering the water quality for two or three parameters by an amount that would not be deemed insignificant pursuant to the criteria set forth in the regulation; however, in such circumstances any impact on classified uses of the segment may be largely hypothetical and relatively minor. If an applicant incorporates into a project water quality-enhancing mitigation measures for the same water segment, such as substantial habitat improvement measures, it may be reasonable to conclude that the net effect of the activity is no significant degradation.

Note that the determination of whether an activity will result in significant degradation takes into consideration all new or increased water quality impacts from the activity. Some parties proposed that only the impacts of pollutant discharges be considered. The language adopted allows the impacts of hydrologic modifications also to be considered. The Commission has addressed the issue of potential interference with the exercise of

water rights by providing in section 3.1.8(3)(d)(iii) that no project alternatives that would be inconsistent with section 25-8-104 of the Water Quality Control Act would be deemed "available." Therefore, no project proponent would be required to implement alternatives that would be inconsistent with the protection provided by that statutory provision.

In addition, note that the potential impact on small water development projects is limited in part by the fact that only projects requiring an individual section 404 permit need a section 401 certification. Projects that qualify for a section 404 exemption or nationwide permit do not require a section 401 certification, and therefore are not subject to the ~~§§~~ ~~antidegradation~~ review requirements.

d. "Area in Which the Waters are Located".

A wide range of proposals for interpreting this language was submitted to the Commission. The Commission believes that it is appropriate to include all areas directly impacted by a proposed activity in the review. For projects that affect multiple basins, this should assure that input is received from each affected area. The Commission decided that defining "area" to always include the entire State would be too broad. For example, some relatively small new developments may not be "important" from a statewide perspective, but may be very important to a local region.

The provision as adopted also will help accommodate the language of EPA's water quality regulations with the established Colorado water rights system, which authorizes transbasin water transfer. For water diversion projects, the "area" would include both the basin from which the diversion occurs and the area in which the water use will occur. A narrower definition of "area in which the waters are located" could essentially prohibit transbasin water transfers from affected streams, whenever significant degradation would result from such activities. Moreover, these activities would be restricted even though other activities with identical water quality impacts (but with economic benefits centered in a different location) would be allowed to proceed. There does not appear to be any basis in the federal Clean Water Act for such a non-water-quality-based, land use policy distinction. In fact, such an interpretation would appear to run directly counter to the section 101(b) recognition of states' "primary responsibilities and rights ... to plan the development and use ... of land and water resources" while protecting water quality.

e. "Important Economic or Social Development".

Implementation of the ~~§§~~ ~~antidegradation~~ rule requires some determination of whether a particular proposed activity is important economic or social development. The Commission intends that the case-by-case determinations regarding this issue will take into account all available information and will recognize that the primary responsibilities and expertise of the Commission and the Division are not in making land use decisions that assess the importance of specific development. While local land use decisions would not be binding on the ~~§§~~ ~~antidegradation~~ determination, the Commission believes that such decisions should be given substantial weight.

The Commission also intends that the determination of importance will be based on the net impacts of a project, after considering both positive and negative impacts. The Commission anticipates that in many instances if there is no information presented to the contrary, the Division will appropriately assume that the proposed development in question is "important." In specific instances, public comment could lead to a contrary conclusion. For example, the people in the area of a proposed development could feel that the jobs and other benefits associated with the development are not important to them compared to the importance of protecting the quality of a local water resource. While acknowledging the primary local role in land use planning, the Commission notes that in some circumstances there may be a dispute regarding which local governmental entity's land use determinations should take precedence. That issue is beyond the scope of these regulations and no attempt is made to resolve it here. Rather, based on all the evidence submitted the Division and, if necessary, the Commission will simply have to decide on a case-by-case basis which local land use determinations are "applicable".

f. Necessity of Degradation.

The determination whether degradation is necessary is to be made by examining whether any less-degrading alternatives are available. The Commission has attempted to circumscribe the range of alternatives considered in several respects. First, alternatives must be economically, environmentally and technologically reasonable. The Commission does not intend by this regulation to force the application of untested new technologies. Second, available alternatives are limited to those that would accomplish the proposed activity's purpose. So long as a project has passed the "important development" test and reached this stage of the review, the "no-action" alternative (i.e., not proceeding with the project) will not be considered an available alternative. Third, in order to avoid undue impact on water rights, the Commission has provided that any alternative that would be inconsistent with the provisions of section 25-8-104 will not be considered "available".\*

Finally, the Commission has chosen to focus on available "water quality control alternatives." While this term is not specifically defined in the regulation the intent is to focus on alternatives directly related to protecting water quality -- e.g., different treatment techniques, different discharge locations, applications of additional best management practices, or process changes that improve discharge quality. It is not the Commission's intention that activity proponents would have to examine completely different types of projects than those originally proposed.

Substantial concern was expressed in comments submitted regarding the additional burden placed on project proponents by establishing an alternatives analysis requirement. The Commission does not intend that this requirement would constitute a major additional burden in most instances. Alternatives analysis is standard engineering practice when planning a new project. New domestic dischargers already are required to undertake an alternatives analysis in the site application process. Projects that require a section 404 permit are already subject to Corps of Engineers and EPA requirements to consider alternatives (see, e.g., [33 CFR section 320.4\(a\)\(2\)\(ii\)](#) and [40 CFR section 230.10\(a\)](#)). Projects subject to federal NEPA requirements already are faced with an

alternatives analysis requirement that goes substantially beyond that required here. The Commission intends that the alternatives analysis for ~~antidegradation~~ review purposes should be coordinated with any such other reviews to the extent possible to avoid unnecessary duplication. So long as a reasonable effort has been made to assess less-degrading alternatives, in many circumstances these other reviews may be sufficient to satisfy the ~~antidegradation~~ review requirements.

The Commission also has included in this section a general list of factors that the Division is directed to consider in making case-by-case determinations whether potential alternatives are economically reasonable. The proposal for this hearing included a more specific test of economic reasonableness. Based on the comments submitted, it appears that it is not possible at this time to formulate one simple test that will yield an appropriate determination in all circumstances. Therefore, the Commission has decided to retain flexibility, while providing some guidance as to the criteria it will apply. If experience demonstrates that more specific criteria are workable and helpful, the regulation can be revised at a later date. Although the Division does not maintain an economist on its staff, the Commission notes that the Division has prior experience with implementing an economic reasonableness concept, especially in the context of certain discharge permit variances, which are no longer available following the adoption of Senate Bill 33 in 1985.

#### 6. Review of Individual Basins.

The Commission intends that these revised ~~antidegradation~~ provisions will generally be applied to individual basins by assessing the appropriateness of water quality-based designations during the next round of triennial reviews. However, the Commission intends that the Division should recommend the establishment of water quality-based designations for a particular water segment prior to the next triennial review whenever

(1) the Division believes the water body should be designated High Quality under the revised criteria and

(2) the Division is aware of proposed development activities that could significantly degrade the water body in question prior to the next triennial review.

Such circumstances warranting an "expedited" review also could be brought to the Commission's attention by the public. Of course, under the hybrid approach, the ~~antidegradation~~ review requirement will apply in some situations without reclassification.

In conducting reviews and applying this revised system in classification hearings, the Commission intends that a determination will first be made as to what use classifications and numeric standards will apply to a water body under the Basic Standards and Methodologies provisions in effect as of July 31, 1988. The determination whether any water quality-based designations are appropriate would then be made with respect to

these new standards.

## 7. Intergovernmental Coordination and Public Participation.

At least two parties to the hearing proposed that local water quality planning agencies should have a formal role in the ~~antidegradation~~ review process. In addition, EPA's ~~antidegradation~~ policy requires that such reviews satisfy intergovernmental coordination and public participation requirements. The Commission has determined that there is no need to adopt special provisions in the ~~antidegradation~~ section of the regulation addressing such input.

The Commission intends in a separate proceeding to revise its Procedural Regulations to establish specific provisions regarding intergovernmental coordination and public participation with respect to the ~~antidegradation~~ review process. Prior to such additional rulemaking, the Commission requests the Division to notify the Commission of the procedures that it will apply to ~~antidegradation~~ reviews on an interim basis, to assure that adequate intergovernmental coordination and public participation occurs.

## Fiscal Impact Statement

The revised ~~antidegradation~~ provisions will require an increased expenditure of public and private resources during the next round of triennial reviews of surface water quality classifications and standards, to assess whether adoption of water quality-based designations is warranted pursuant to the new "High Quality" and "Use-Protected" criteria. However, the magnitude of this impact may not be substantial. The information requirements for determination of water quality-based designations should not differ substantially from those required for determining appropriate use classifications. The cost associated with collection of data to determine, for example, the appropriateness of an aquatic life classification and associated standards should not differ from that of determining the suitability of a stream for a high quality designation.

To the extent that additional streams are subject to ~~antidegradation~~ reviews as a result of these changes, an additional expenditure of public and private resources will be required. The review process will require additional Division staff time. The magnitude of these impacts can not be quantified at this time, since the exact number of activities that will be subject to ~~antidegradation~~ reviews also can not be specifically quantified. However, the Commission has attempted to assure that such reviews will not constitute a major additional burden in most instances, by establishing the "significant degradation" screening criteria and by attempting to establish reasonable parameters on the alternatives analysis requirement.

No major adverse fiscal impact is anticipated as a result of the substantive application of the ~~antidegradation~~ review requirements. The Commission has attempted to develop an ~~antidegradation~~ implementation process that assures a demonstration that degradation is necessary before it is allowed for high quality streams, while not precluding additional important development where such degradation is necessary. There

could be a fiscal impact to a specific project if the Commission finds that it does not constitute "important development." With the Commission's recognition of the primary local government land use planning role, it is unlikely that a project would be excluded on this basis except in rare instances. Absent such a finding, a project could be denied under the revised regulation only if there is a finding that there are economically, environmentally and technologically reasonable alternatives available but the project proponent refuses to implement such alternatives.

The new ~~antidegradation~~ provisions will result in new, unquantifiable benefits to the general public from increased protection of Colorado's high quality water resources. While these benefits are unquantifiable, the Commission believes that they may be substantial in preserving high quality natural resources.

Parties to March, 1988 Hearing

1. AMAX Inc.
2. Colorado Water Congress
3. Metropolitan Denver Sewage Disposal District No. 1
4. Eastman Kodak Company
5. Colorado Mining Association
6. City of Colorado Springs
7. North Front Range Water Quality Planning Association
8. Metropolitan Water Providers
9. Rocky Mountain Oil and Gas Association (RMOGA)
10. Amoco Production Company
11. Environmental Defense Fund
12. Northwest Colorado Council of Governments (NWCCOG)
13. City & County of Denver Board of Water Commissioners
14. Adolph Coors Company (Coors)
15. Northern Colorado Water Conservancy District  
and Municipal Subdistrict
16. Sierra Club and The Wilderness Society
17. Southeastern Colorado Water Conservancy District  
(Southeastern District)
18. CF&I Steel Corporation (CF&I)
19. Umetco Minerals Corp. (Umetco)
20. Martin Marietta Corp.
21. Shell Oil Company
22. Coffer Corporation
23. Division of Wildlife
24. Union Oil of California
25. City of Broomfield
26. Trout Unlimited

**Citation:** Volume 5, 5 CCR 1002, 1002-21, 1002-21

**Jurisdiction:** Colorado

**Document Date:** December 30, 2000

**Page Count:** 3



**Section Title:** 21.16 Antidegradation Review Procedures -- Public Participation and Intergovernmental Coordination (Integrated)

**Subject** water, water quality, government, reference, public participation,

**Terms:** administrative, appeal

**Source:** Integrated Document

---

21.16 ~~Antidegradation~~ Review Procedures -- Public Participation and Intergovernmental Coordination.

A. Substantive provisions relating to ~~antidegradation~~ reviews are set forth in the Basic Standards and Methodologies for Surface Water, Regulation No. 31, section 31.8 (5 CCR 1002-31).

B. Notice of Preliminary ~~Antidegradation~~ Review Determination

These notice requirements apply to activities with new or increased water quality impacts that may degrade the quality of reviewable waters subject to ~~antidegradation~~ review requirements (see Basic Standards and Methodologies for Surface Water, Regulation No. 31, section.30 31.8(1)(b)).

1) Notice that the Division has reached a preliminary ~~antidegradation~~ review determination shall be provided at the time and in the manner described below for each category of Division reviews. Only one ~~antidegradation~~ review shall occur, in conjunction with the earliest applicable Division review listed below; provided, that the Division may perform a supplemental ~~antidegradation~~ review if it determines that subsequent changes in the project would result in substantially different water quality impacts.

a) When the Division receives notification that section 201 facility planning will occur for sewage treatment plan projects seeking a grant or loan; the Division shall give notice of the preliminary ~~antidegradation~~ determination by publication in the next feasible Water Quality Information Bulletin sent to persons on the mailing list maintained by the Division pursuant to section 25-8-302 (1)(e) C.R.S., and by mailing a copy of the preliminary ~~antidegradation~~ determination to the activity proponent, Environmental Protection Agency, any regional council of governments, county, local health department, and cities and towns that the Division believes may be affected by the proposed activity, and to any persons that the activity proponent requests receive such notice.

b) When the Division receives a request for approval of the site location or design of domestic wastewater treatment works, pursuant to section 25-8-702 C.R.S.; the Division shall give notice of the preliminary ~~antidegradation~~ determination by publication in the next feasible Water Quality Information Bulletin sent to persons on the mailing list maintained by the Division pursuant to section 25-8-302 (1)(e) C.R.S., and by mailing a copy of the preliminary ~~antidegradation~~ determination to the activity proponent,

Environmental Protection Agency, any regional council of governments, county, local health departments, and cities and towns that the Division believes may be affected by the proposed activity, and to any persons that the activity proponent requests receive such notice.

c) When the Division receives a surface water discharge permit application, pursuant to section 25-6-601 C.R.S.; the Division shall give notice of the preliminary ~~≤≤~~ ~~antidegradation≥≥~~ determination by inclusion with the notice of the proposed permit pursuant to the procedures in section 61.5(2)(e), of the Colorado State Discharge Permit System Regulations.

d) When the Division receives a request for section 401 certification, pursuant to section 25-8-302(1)(f) C.R.S., the Division shall give notice of the preliminary ~~≤≤~~ ~~antidegradation≥≥~~ determination in the draft certification determination and by inclusion in the next feasible Water Quality Information Bulletin sent to persons on the mailing list maintained by the Division pursuant to section 25-8-302(1)(e) C.R.S., and by mailing a copy of the preliminary draft certification determination to the activity proponent, Environmental Protection Agency, any regional council of governments, county, local health departments, and cities and towns that the Division believes may be affected by the proposed activity, and to any persons that the activity proponent requests receive such notice.

2) The notice of ~~≤≤~~ ~~antidegradation≥≥~~ review determination shall include:

a) Identification of the proponent of the proposed activity;

b) A description of the type of proposed activity;

c) Identification of the stream segment, river basin, and county in which the proposed activity is located;

d) The preliminary ~~≤≤~~ ~~antidegradation≥≥~~ review determination of the Division, including the rationale for the determination citing the considerations in Regulation No. 31, section 31.8(3) of the Basic Standards and Methodologies for Surface Water.

e) A request for the submission of comments (within 30 days or such longer period as the Division may establish) regarding:

i) The significance of any water quality degradation expected to result from the proposed activity;

ii) Whether the proposed activity is important economic or social development; and

iii) Whether there are economically, environmentally, and technologically reasonable water quality control alternatives available that would result in no degradation or less degradation of state waters.

### C. Final ~~Antidegradation~~ Review Determination

- 1) Prior to making its final ~~antidegradation~~ review determination, the Division shall consider all comments received in response to the notices required by this section.
- 2) At its discretion, prior to making its final ~~antidegradation~~ review determination the Division may conduct one or more public meetings to receive or exchange information regarding the proposed activity, if the Division determines that such a meeting would be helpful.
- 3) For those projects requiring 401 certification that the Corps of Engineers determines require an environmental impact statement and/or a public hearing, the Division shall not make a final ~~antidegradation~~ review determination until such EIS or hearing is completed.
- 4) The Division shall not make a final ~~antidegradation~~ review determination for those discharge permits for which a public meeting is conducted until the public meeting(s) provided for in section 61.5(3) of the Colorado State Discharge Permit System Regulations have been completed.
- 5) Copies of the final determination shall be circulated to the activity proponent and to all persons requesting notification in response to the earlier notice of ~~antidegradation~~ review.

D. Appeals of Final Determinations 1) The Division's determination of the significance of any water quality degradation pursuant to Regulation No. 31, section 31.8(3)(c) of the Basic Standards and Methodologies for Surface Water, and its determination whether degradation is necessary to accommodate important economic or social development in the area in which the waters are located, pursuant to section 31.8(3)(d) of that rule, shall be subject to de novo review by the Commission in accordance with the procedures set forth in section 21.4 of this rule.

2) A review of a final ~~antidegradation~~ review determination by the Division may be initiated on the Commission's own motion, pursuant to a petition by any interested person who has submitted written comments during the Division review process, or on the Commission's determination pursuant to section 24-4-105(2), C.R.S.

**Citation:** Volume 5, 5 CCR 1002, 1002-31, 1002-31

**Jurisdiction:** Colorado

**Document Date:** March 20, 2001

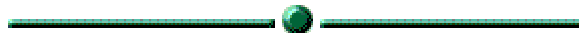
**Page Count:** 5

**Section Title:** 31.8 Antidegradation (Integrated)

**Subject** water, water quality, surface water, protection, water classification,

**Terms:** applicability, administrative, POTW, public participation

**Source:** Integrated Document



### 31.8 ~~Antidegradation~~.

#### (1) ~~Antidegradation~~ Rule.

(a) The highest level of water quality protection applies to certain waters that constitute an outstanding state or national resource. These waters, which are those designated outstanding waters pursuant to section 31.8(2)(a), shall be maintained and protected at their existing quality.

(b) An intermediate level of water quality protection applies to waters that have not been designated outstanding waters or use-protected waters. These waters shall be maintained and protected at their existing quality unless it is determined that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. For these waters, no degradation is allowed unless deemed appropriate following an ~~antidegradation~~ review in accordance with section 31.8(3). Further, all applicable statutory and regulatory requirements for point sources and, if applicable control regulations have been adopted, all cost-effective and reasonable best management practices for nonpoint sources shall be met.

(c) At a minimum, for all state surface waters existing classified uses and the level of water quality necessary to protect such uses shall be maintained and protected. No further water quality degradation is allowable which would interfere with or become injurious to these uses. The classified uses shall be deemed protected if the narrative and numerical standards are not exceeded.

The ~~antidegradation~~ review requirements in section 31.8(3) are not applicable to waters designated use-protected pursuant to section 31.8(2)(b). For these waters, only the protection specified in this subparagraph applies.

(d) Water quality designations and reviewable water provisions shall not be utilized in a manner that is contrary to the provisions of sections 25-8-102 and 25-8-104, C.R.S.

#### (2) Water Quality-Based Designations

Waters which satisfy the criteria in subparagraph (a) below may be designated by the Commission as "outstanding waters". Waters which satisfy the criteria in subparagraph (b) below may be designated "use-protected." Waters not satisfying either set of criteria will remain undesignated, and will be subject to the ~~antidegradation~~ review provisions set forth in section 31.8(3), below.

##### (a) Outstanding Waters Designation

Waters may be designated outstanding waters where the Commission makes all of the following three determinations:

(i) The existing quality for each of the following parameters is equal to or better than that specified in tables I, II, and III for the protection of aquatic life class 1, recreation class 1, and (for nitrate) domestic water supply uses:

Table I: dissolved oxygen, pH, fecal coliform, E. coli

Table II: chronic un-ionized ammonia, nitrate

Table III: chronic cadmium, chronic copper, chronic lead, chronic manganese, chronic selenium, chronic silver, and chronic zinc

The determination of existing quality shall be based on adequate representative data, from samples taken within the segment in question. Data must be available for each of the 12 parameters listed; provided, that if fecal coliform samples from within the segment are infeasible due to its location, and a sanitary survey demonstrates that there are no human sources present that are likely to impact quality in the segment in question, fecal coliform or E. coli data will not be required. "Existing quality" shall be the 85th percentile of the data for un-ionized ammonia, nitrate, and dissolved metals, the 50th percentile for total recoverable metals, the 15th percentile for dissolved oxygen, the geometric mean for fecal coliform and E. coli, and the range between the 15th and 85th percentiles for pH.

In addition, the foregoing notwithstanding, this test shall not be considered to be met if the Commission determines that, due to the presence of substantial natural or irreversible human-induced pollution for parameters other than those listed above, the quality of the waters in question should not be considered better than necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water.

(ii) The waters constitute an outstanding natural resource, based on the following:

(A) The waters are a significant attribute of a State Gold Medal Trout Fishery, a National Park, National Monument, National Wildlife Refuge, or a designated Wilderness Area, or are part of a designated wild river under the Federal Wild and Scenic Rivers Act; or

(B) The Commission determines that the waters have exceptional recreational or ecological significance, and have not been modified by human activities in a manner that substantially detracts from their value as a natural resource.

(iii) The water requires protection in addition to that provided by the combination of water quality classifications and standards and the protection afforded reviewable water under section 31.8(3).

(b) Use-Protected Designation

These are waters that the Commission has determined do not warrant the special

protection provided by the outstanding waters designation or the ~~antidegradation~~ review process.

(i) Waters shall be designated by the Commission use-protected if any of the criteria below are met, except that the Commission may determine that those waters with exceptional recreational or ecological significance should be undesignated, and deserving of the protection afforded by the ~~antidegradation~~ review provisions of section 31.8(3):

(A) The use classifications of the waters include aquatic life cold or warm water class 2;

(B) The existing quality for at least three of the following parameters is worse than that specified in tables I, II and III for the protection of aquatic life class 1, recreation class 1 and (for nitrate) domestic water supply uses:

Table I: dissolved oxygen, pH, fecal coliform or E. coli

Table II: chronic unionized ammonia, nitrate

Table III: chronic cadmium, chronic copper, chronic lead, chronic manganese, chronic selenium, chronic silver, and chronic zinc

The determination of existing quality shall be based on adequate representative data, from samples taken within the segment in question. Data must be available for each of the 12 parameters listed; provided, that if fecal coliform or E. coli samples from within the segment are infeasible due to its location, and a sanitary survey demonstrates that there are no human sources present that are likely to impact quality in the segment in question, fecal coliform data will not be required. "Existing quality" shall be the 85th percentile of the data for un-ionized ammonia, nitrate, and the dissolved metals, the 50th percentile for total recoverable metals, the 15th percentile of such data for dissolved oxygen, the geometric mean of such data for fecal coliform and E. coli, and the range between the 15th and 85th percentiles for pH; or

(C) The water body is subject to significant existing point source discharges and the quality currently is maintained better than standards only because the treatment achieved by the existing dischargers exceeds requirements of federal and state law and might not be maintained at that level in the future.

(ii) In addition, waters may be designated use-protected even though none of the preceding criteria apply if the Commission determines that due to the presence of substantial natural or irreversible human-induced pollution for parameters other than those listed in section 31.8(2)(b)(i)(B) the quality of the waters in question should not be considered better than necessary to support aquatic life class 1 and recreation class 1 uses.

(3) ~~Antidegradation~~ Review Process



#### (a) Applicability

These ~~antidegradation~~ review procedures shall apply to the review of regulated activities with new or increased water quality impacts that may degrade the quality of state surface waters that have not been designated as outstanding waters or use-protected waters, including waters previously designated as high quality class 2. These waters are referred to below as "reviewable waters." "Regulated activities" means any activities which require a discharge permit or water quality certification under federal or state law, or which are subject to state control regulations unless the Commission has specified in the control regulation that the ~~antidegradation~~ review process is not applicable. Where possible, the antidegradation review should be coordinated or consolidated with the review processes of other agencies concerning a proposed activity in an effort to minimize costs and delays for such activities.

#### (b) Division and Commission Roles

For regulated activities, the significance determination set forth in section 31.8(3)(c) and the determination whether degradation is necessary to accommodate important economic or social development in the area in which the waters are located, pursuant to section 31.8(3)(d), shall be made by the Division, subject to a de novo review by the Commission in an adjudicatory hearing, on the Commission's own motion, pursuant to a petition by any interested person who has submitted written comments during the Division review process, or on the Commission's determination pursuant to section 24-4-105(2), C.R.S.

#### (c) Significance Determination

The initial step in an ~~antidegradation~~ review shall be a determination whether the regulated activity in question is likely to result in significant degradation of reviewable waters, with respect to adopted narrative or numeric standards. The significance determination will be based on the chronic numeric standard and flow for the pollutant of concern except for those pollutants which have only acute numeric standards in which case the acute standard and flow will be used. This significance determination shall be made with respect to the net effect of the new or increased water quality impacts of the proposed regulated activity, taking into account any environmental benefits resulting from the regulated activity and any water quality enhancement or mitigation measures impacting the segment or segments under review, if such measures are incorporated with the proposed regulated activity. The regulated activity shall be considered not to result in significant degradation, as measured in the reviewable waters segment, if:

(i) For bioaccumulative toxic pollutants, (i.e., those chemicals for which the bioaccumulation factor (BAF) is equal to or greater than 1000) the new or increased loading from the source under review is less than 10 percent of the existing total load to that portion of the segment impacted by the discharge for critical constituents; provided, that the cumulative impact of increased loadings from all sources shall not exceed 10 percent of the baseline total load established for the portion of the segment impacted by

the discharge (the baseline total load shall be determined at the time of the first proposed new or increased water quality impacts to the reviewable waters); and

(ii) For all pollutants:

(A) The flow rate or volume of a new or increased discharge under review is small enough that it will be diluted by 100 to 1 or more at low flow, as defined in section 31.9, by water in the stream; or

(B) The new activity or increased discharge from the source under review will consume, after mixing, less than 15 percent of the baseline available increment, provided that the cumulative increase in concentration from all sources shall not exceed 15 percent of the baseline available increment. The baseline available increment is the increment between low-flow pollutant concentrations and the relevant standards for critical constituents for that portion of the segment impacted by the discharge. The baseline low-flow pollutant concentration shall represent the water quality as of September 30, 2000, and shall be determined at the time of the first proposed new or increased water quality impacts to the reviewable waters after that date; or

(C) The regulated activity will result in only temporary or short term changes in water quality. This exception shall not apply where long-term operation of the regulated activity will result in an adverse change in water quality.

For the purposes of this subsection, the phrase "portion of the segment impacted by the discharge" means the portion of the stream from the discharge point to the first major tributary inflow, or as determined by the Division based on site-specific information at the time of the analysis.

(d) Necessity of Degradation Determination

If a determination has been made in accordance with section 31.8(3)(c) that a proposed regulated activity is likely to result in significant degradation of reviewable waters, a determination shall be made pursuant to this section whether the degradation is necessary to accommodate important economic or social development in the area in which the waters are located. The following provisions shall apply to this determination:

(i) The "area in which the waters are located" shall be determined from the facts on a case-by-case basis. The area shall include all areas directly impacted by the proposed regulated activity.

(ii) A determination shall be made from the facts on a case-by-case basis whether the proposed regulated activity is important economic or social development. If the activity proponent submits evidence that the regulated activity is important development, it shall be presumed important unless information to the contrary is submitted in the public review process. The determination shall take into account information received during the public comment period and shall give substantial weight to any applicable determinations

by local governments or land use planning authorities.

(iii) If the proposed regulated activity is determined to be important economic or social development, a determination shall be made whether the degradation that would result from such regulated activity is necessary to accommodate that development. The degradation shall be considered necessary if there are no water quality control alternatives available that

(A) would result in no degradation or less degradation of the State waters and

(B) are determined to be economically, environmentally, and technologically reasonable.

This determination shall be based on an assessment of whether such alternatives are available, based upon a reasonable level of analysis by the project proponent, consistent with accepted engineering practice, and any information submitted by the public or which is otherwise available. The assessment shall address practical water quality control technologies, the feasibility and availability of which has been demonstrated under field conditions similar to those of the activity under review. The scope of alternatives considered shall be limited to those that would accomplish the proposed regulated activity's purpose. Any alternatives that would be inconsistent with section 25-8-104 of the Water Quality Control Act shall not be considered available alternatives.

In determining the economic reasonableness of any less-degrading water quality control alternatives, the Division may take into consideration any relevant factors, including but not limited to the following, if applicable:

(A) Whether the costs of the alternative significantly exceed the costs of the proposal;

(B) For publicly owned treatment works (POTWs) or public water supply projects, whether user charges resulting from the alternative would significantly exceed user charges for similarly situated POTWs or public water supply projects;

(C) For private industry, whether the alternative would have a significant adverse effect upon the project's profitability or competitive position (if the project proponent chooses to provide such information);

(D) For any dischargers, whether treatment costs resulting from the alternative would significantly exceed treatment costs for any similar existing dischargers on the segment in question.

(E) The relative, long-term, energy costs and commitments and availability of energy conservation alternatives.

(e) Public Participation and Intergovernmental Coordination.

Procedural provisions relating to public participation and intergovernmental coordination

and ~~antidegradation~~ reviews are set forth in the Procedural Rules, Regulation No. 21, section 2.1.16 (5 CCR 1002-21).

(f) Public Nomination -- Water Quality Based Designations

Any person may nominate any state water for designation as outstanding waters or use-protected during triennial review or at any time. Such nomination shall include written documentation of the qualifications for such designation based upon the criteria in section 31.8(2)(a) or (b).

(g) Protection of Existing Uses

If, during an ~~antidegradation~~ review, it is determined that an existing use of the affected waterbody has not been classified, prior to completing the ~~antidegradation~~ review for an applicable regulated activity, an expeditious rulemaking hearing shall be held (on an emergency basis if necessary) to consider adoption of the additional classification.